

Back to the Future: The Curious Case of *United States v. Jones*

Erin Murphy*

The media greeted the handing down of the opinion in *United States v. Jones* with exuberant fanfare. Technically, however, almost all the headlines reported its holding inaccurately. In proclaiming that the “Supreme Court rules warrant needed for GPS tracking”¹ or “Warrantless GPS tracking unconstitutional, Supreme Court rules,”² journalists missed one of the most interesting aspects of the case.³ Although the Justices did all agree that prolonged location tracking infringed a Fourth Amendment interest, none of the three separate opinions imposed a warrant requirement, and the concurrers even suggested that something other than a traditional warrant might suffice.

Nevertheless, the press was right to celebrate. With *United States v. Jones*,⁴ the Supreme Court has at long last been dragged into the modern world (some Justices kicking and screaming), and forced to confront the conflict inherent in applying the rules of an analog Court to the actions of a digitalized police force. To be sure, the Court has flirted with such recognition before: whether with *Kyllo*’s heat sensors,⁵ *Ciraolo*’s airplanes,⁶ or even the *Knotts* and *Karo* beepers that were *Jones*’s predecessors. But in each of those cases, the Court resolved the issue on the basic facts before it, resisting discussion of the new technology as any kind of harbinger of a more constitutionally complex world.

* Professor of Law, New York University School of Law. I am grateful to David Sklansky, Barry Friedman, and Steve Schulhofer for their comments on an earlier draft of this Essay, as well as to the participants at the Berkeley summer workshop series for their helpful remarks. I thank Nathan Rubenson for his customary excellence as a research assistant, as well as the Filomen D’Agostino and Max E. Greenberg Research Fund for its support.

¹ Joan Biskupic, *Supreme Court rules warrant needed for GPS tracking*, USA TODAY, Jan. 24, 2012, <http://www.usatoday.com/news/washington/judicial/story/2012-01-23/supreme-court-gps/52754354/1>.

² Mike Sacks, *Warrantless GPS Tracking Unconstitutional, Supreme Court Rules*, HUFFINGTON POST (Jan. 23, 2012, 1:24 PM), http://www.huffingtonpost.com/2012/01/23/warrantless-gps-tracking-_n_1224000.html.

³ Tom Goldstein, of the highly respected SCOTUS blog, compiled a list of the major erroneous print headlines from sources as diverse as The Los Angeles Times, the Associated Press, and Reuters, some of whom also erred in the body of the story. Tom Goldstein, *Jones confounds the press*, SCOTUSBLOG (Jan. 25, 2012, 11:30 AM), <http://www.scotusblog.com/?p=137791>.

⁴ 132 S. Ct. 945 (2012).

⁵ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁶ *California v. Ciraolo*, 476 U.S. 207 (1986).

With *Jones*, however, the new world order was inescapable. Shrugging off the government's attempt to classify a month of uninterrupted GPS surveillance as simply "mak[ing] observations of matters in public view,"⁷ every member of the Court called it for what it was: a dossier of over "2,000 of pages of data"⁸ that reported by latitude and longitude its subject's every movement over a four week period. The concurring Justices even recognized that there was no way to compile this information without technology; to do so would have exhausted the most indefatigable of police forces.⁹ *Jones* therefore represents the Court's first overt admission that technology has materially changed the nature of contemporary policing, and by extension the relationship between the people and the state.

Enter the conundrum. Historically, the Court has couched the protections of the Fourth Amendment in the language of privacy and property. Yet expectations about freedom from government interference are no longer solely expressed in those terms. People routinely trade their privacy or property interests for complimentary e-mail services or faster toll crossings, and yet unfettered access to such information strikes many observers as contrary to the Fourth Amendment's core values. If neither privacy nor property theories provide a constitutional basis for oversight, however, then what?

In *Jones*, the Justices were confronted with just this dilemma. In response, as this Essay will show, roughly half of the Justices followed Justice Scalia into the shelter of originalism. The other half, led by Justice Alito, ventured a bit more boldly into the great unknown, but ultimately punted responsibility to a coordinate branch. Only Justice Sotomayor made a first attempt at tackling the problem, but she wrote alone. Regrettably, none of the opinions offered lasting guidance to lower courts, much less to law enforcement actors. Nevertheless, this essay argues that each is still notable for some aspect of what it conveys. It closes by postulating that *Jones* is most interesting for what it didn't say—press reports notwithstanding.

I. WHY THE MAJORITY WAS RIGHT

The most surprising thing about Justice Scalia's majority opinion is its mercy: *Katz* survives with nary a scratch. In the past, Justice Scalia has expressed his disdain for the test,¹⁰ even going so far as to suggest that *Katz* itself was wrongly

⁷ Brief for Petitioner at 22, *United States v. Jones*, 132 S. Ct. 945 (2012); *United States v. Knotts*, 460 U.S. 276, 281 (1983); *United States v. Karo*, 468 U.S. 705, 716 (1984).

⁸ 132 S. Ct. at 948.

⁹ *Id.* at 956 (Sotomayor, J., concurring); *id.* at 963 (Alito, J., concurring).

¹⁰ *Kyllo*, 533 U.S. at 34 (criticizing the test as "subjective and unpredictable"); *Minnesota v. Carter*, 525 U.S. 83, 91–92 (1998) (Scalia, J., concurring) (calling it "fuzzy" and criticizing parties for briefs that "give[] short shrift to the text of the Fourth Amendment").

decided.¹¹ But the Justice who famously ridiculed the reasonable expectation of privacy standard unequivocally wrote in *Jones* that “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”¹² Of course, for criminal procedure scholars, most of whom had long assumed property law a non-starter, the real headline for the *Jones* case might thus have better read, “Two tests, not one, govern Fourth Amendment applicability!”¹³ That is why Justice Scalia had his work cut out for him. Although he splices enough hairs to make it work in his opinion, the precedent that he wrangles had fairly settled that property law no longer stood as a gateway to Fourth Amendment protection. As the concurrence by Justice Alito ably pointed out, the Court had repeatedly distanced itself from property and positive law as the source of Fourth Amendment rights. After all, property rights feel equally offended by the beepers installed in *Knotts* and *Karo*, or the trespass on the open fields of *Oliver*,¹⁴ but those cases all but overtly rejected positive law as a determinant of the constitutional analysis.

Apart from its “disharmony with a substantial body of existing case law,”¹⁵ Justice Scalia’s attachment to trespass as a means of deciding the *Jones* case presented additional problems well summarized in Justice Alito’s concurring

¹¹ *Fox News Sunday with Chris Wallace* (Fox News television broadcast July 29, 2012), transcript available at <http://www.maggiestnotebook.com/2012/07/scotus-justice-antonin-scalia-full-transcript-video-interview-7-29-12-rocket-launchers-privacy-arizona-illegals> (“Look, the way the Fourth Amendment reads is, the people shall be secure in their persons, houses, papers and effects, against unreasonable search and seizure. The first time my Court had a case involving wiretapping, it said that’s not covered by the Fourth Amendment. There can be state laws against it and most states had laws, but it’s not persons, houses, papers and effects. It’s not covered by the Fourth Amendment. The court reversed that, I don’t know, 20 years later or so in a wave of non-originalism. Constitution means what it ought to mean. Well, it simply doesn’t cover that, which means that it’s left to—it’s left to democratic choice, as most things are, even important things like abortion.”).

¹² *Jones*, 132 S. Ct. at 952. The oral argument hinted as much. In formulating a property rights based question, Justice Scalia previewed his ultimate position, asking,

Does—are you obtaining information that a person had a reasonable expectation to be kept private? I think that was wrong. I don’t think that was the original meaning of the Fourth Amendment. But nonetheless it’s been around for so long, we are not going to overrule that. However, it is one thing to add that privacy concept to the Fourth Amendment as it originally existed and it is quite something else to use that concept to narrow the Fourth Amendment from what it originally meant.

Transcript of Oral Argument at 6–7, *United States v. Jones*, 132 S. Ct. 27 (2012) (No. 10-1259).

¹³ The reintroduction of trespass as a viable route to Fourth Amendment protection might, at first glance, seem an exciting proposition. If the expectation of privacy is one that may derive from “real or personal property law,” *Jones*, 132 S. Ct. at 951, then perhaps protections inhere in the many forms of innovative entitlements found in contemporary property law. But the rest of the majority’s opinion seems very much tethered to an idea of property as frozen in the 18th century, not one that is imagining broad new horizons.

¹⁴ *Oliver v. United States*, 466 U.S. 170, 184 (1984).

¹⁵ *Jones*, 132 S. Ct. at 959–61 (Alito, J., concurring).

opinion. The majority's reasoning: "disregards what is really important,"¹⁶ leads to "incongruous results,"¹⁷ creates opportunities for local variation in constitutional protection,¹⁸ and either endorses superficial distinctions or leads to underprotection of rights if non-physical intrusions are left uncovered. The concurrence's dismay is palpable in the opinion's opening sentences, which jab at the majority's "reliance on 18th century tort law" to resolve questions about a "21st century surveillance technique."¹⁹ In other words, only a justice inclined to worry about the privacy of the lady of the house during her evening sauna could unblinkingly conjure "a gigantic coach, a very tiny constable, or both"²⁰ in order to make the laws of 1789 comport with technologies of year 2012.

The concurrence has the better of the argument on all four of its points, and woe to the generation of law students that will now struggle with the idea that the Fourth Amendment "trespass" test applies to a beeper attached by police, while its "expectation of privacy" test governs a beeper installed by the dealership. Woe also to the criminal proceduralists who may need to relearn the right of replevin in order to answer hypotheticals about a guy who gives a ride to his buddy, who turns out to be an undercover cop, whose GPS enabled cell phone conveniently gets "lost" under the front seat. For that reason alone the concurrence has it right that it was nothing more than accident that conventional property rights could resolve this case, and accident is a bad basis upon which to make constitutional law.

And yet. Right as Alito may be to mock the majority's reliance on property law, Justice Scalia is not completely wrong. Consider the case of one animal rights activist who found a device surreptitiously attached to her car.²¹ After carrying it around for a week, afraid to alert law enforcement that she had learned of its existence, she had her lawyer contact the FBI. They asked for it back, brazenly asserting that it was their property. The same thing happened to a young Arab-American student, Yasir Afifi.²² In 2010, a routine oil change revealed that a

¹⁶ *Id.* at 961 (snidely noting that the Court "instead attaches great significance to something that most would view as relatively minor . . .").

¹⁷ *Id.* (noting that, on this reading, the Constitution would allow the same information to be obtained through aerial surveillance).

¹⁸ *Id.* at 962.

¹⁹ *Id.* at 957.

²⁰ *Id.* at 959 n.3 (responding to the majority's claim that the GPS unit was akin to a "constable's concealing himself in the target's coach in order to track his movements"). The sauna image was summoned by Justice Scalia in his majority opinion in *Kyllo v. United States*, 533 US 27, 38 (2001).

²¹ Ian Herbert, *Where Are We with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence*, 16 *BERKELEY J. CRIM. L.* 442, 455–60 (2011).

²² Afifi is represented in his lawsuit against the government by lawyers for the Council on American-Islamic Relations, who filed an amicus brief for Respondent in the *Jones* case. Brief for the Council on American-Islamic Relations as Amici Curiae Supporting Respondents, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

strange looking device had been attached to his car. A friend of Afifi's posted pictures of the device on a popular website, and commentators identified it as a GPS tracker. Agents of the FBI then showed up at his apartment, demanding that he return the tracker and take down the website.²³

To be sure, the most troubling aspect of these stories is the unchecked nature of the surveillance, but they also touch on something primitive about the nature of *property*. It just feels wrong that the government surreptitiously installed the thing, and then had the gall to demand it back. To be fair, the government's argument is not wholly indefensible—these devices can be expensive, and they do contain proprietary technology that the government has an interest in not seeing deconstructed on a public website. But it is also deeply offensive—how dare the police sneak something onto your property and then assert a right to reclaim it? The physical intrusion is even more insulting when you consider that some location trackers require investigators to return to the device to charge it or collect data.²⁴ It is one thing to stick a device on someone's car, but it feels a degree more invasive to go back to it every four days to switch out the batteries. Property may be the wrong lens, but that does not necessarily mean it is not a little bit right—there may still be a reason why possession is said to be nine-tenths of the law.

The aftertaste of property that remains after chewing on privacy rights leads to another interesting aspect of the majority's opinion. As we all know, the Fourth Amendment protects against unreasonable "searches and seizures." Most constitutional doctrine does not take pains to delineate which of the two interests are at stake in a given case: when police rifle through a bag, courts usually do not linger over whether the problem was the seizure of the bag or the search. Indeed, apart from seizures of persons, there is relative seamlessness between the "search" lines of analysis and the "seizure" lines, both of which have historically been triggered by the same basic *Katz* requirement.

But Justice Scalia in his opinion specifically distinguishes the tracking as an illicit "search,"²⁵ rather than seizure. Normally, this would not signify much, but the majority's desire to resuscitate trespass theory required it to distinguish *Karo*'s seemingly unambiguous statement that "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation."²⁶ Accordingly, the Court does so by clarifying that "*Karo* was considering whether a *seizure* occurred, and . . . a seizure of property occurs not when there is a trespass, but when there is some meaningful interference with an individual's possessory interests in that property."²⁷

²³ See generally Herbert, *supra* note 21, at 455–60 (reciting facts of several cases).

²⁴ *Id.* at 485.

²⁵ *Jones*, 132 S. Ct. at 949.

²⁶ *Id.* at 951 (quoting the concurrence quoting *United States v. Karo*, 468 U.S. 705, 713 (1984)).

²⁷ *Id.* (emphasis added). This is consistent with the majority's take on *Soldal v. Cook County*, 506 U.S. 56, 61 (1992), which held that law enforcement infringed a constitutional interest when they

In other words, *Karo* was not a case about police following someone around using surreptitious technology, it was just a case about seizing canisters by means of beeper insertion. Thanks to *Jones*, we now know that a *seizure* requires a *meaningful* interference with property rights, whereas a *search* occurs whenever an expectation of privacy has been invaded, either regardless of property rights (pure *Katz* social norms) or via even a trivial impingement on property (*Jones* trespass). This lesson might be the criminal procedure scholar's second real headline: "Search and seizure of property apparently governed by (slightly) different tests!"²⁸

As the concurrence observes, however, the problem with tying the concept of "search" to trespass is that it comes perilously close to rendering every installation of a tracking device or minor infringement on property interests a constitutional violation. The majority anticipates this issue, and explains that "[t]respass alone does not qualify . . . there must be . . . an attempt to find something or to obtain information."²⁹ But the concurers are right to resist their explication, although they give the wrong reasons. The concurers' quibble is that the rationale "is dependent on the questionable proposition that [installation and use of the device] cannot be separated for purposes of Fourth Amendment analysis."³⁰ In other words, because simply attaching the device is not alone seizure (as it only *minimally* infringes a property right), and because receiving the data from the device is not alone search (because that requires no trespass, and offends no expectation of privacy), it is only by pasting both actions together that an illicit "search" can be created.

But contrary to the concurers' suggestion that there is something illegitimate about amalgamating the actions in this way, in general this kind of comprehensive assessment is a positive development that will hopefully gain traction in future cases. The majority focused on the installation of the device as a way of rendering the act of using it illegitimate, but Fourth Amendment law would also benefit from thinking the same way in reverse: the use of information might be enough to render its acquisition unlawful. Current Fourth Amendment law emphasizes acquisition: how did the police acquire the DNA sample or financial record or biometric

removed a trailer home, because even though the owners' privacy was not invaded, their property rights were. *Jones*, 132 S. Ct. at 951.

²⁸ There is some precedent for such determined parsing of constitutional categories. Specifically, Justice Scalia's majority opinion in *California v. Hodari D.*, 499 U.S. 621, 622 (1991) suggested that the constitutional standard for a seizure of the person required application of physical force (or, possibly, a submission to a show of authority), even while acknowledging that, under *Katz*, a seizure of effects (a telephone conversation) could be effectuated through non-physical means. *Id.* at 627 & n.3. I am grateful to Stephen Schulhofer for highlighting this point, which he notes in his book was a distinction drawn without explanation, and which he rightly decries as "artificial." STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 89–90 (2012).

²⁹ *Jones*, 132 S. Ct. at 951 n.5.

³⁰ *Id.* at 958 (Alito, J., concurring).

image? It cares little for what happens next—to what use that information is put. Suggesting that the constitutional standard might embrace greater complexities—allowing some usages of lawfully obtained information but disallowing others, or shutting down some unseemly ways of getting even publicly available information as improper—is to my lights a good thing.

That is not to say that the majority's reasoning closes more doors than it opens. In *Jones*, the device was installed and monitored by law enforcement. But what if it were installed by the police but never activated?³¹ Or installed by a third party (like OnStar), but activated by law enforcement? Or both installed and activated by a third party, but monitored by law enforcement? Is the scope of the traditional *Katz* test in such a situation commensurate with the scope of *Jones*'s revived trespass test, or does the added offense of the trespass make prolonged surveillance cross a constitutional line from which an invasion of privacy realized without any trespass would stay clear? In other words, if the majority thinks the real wrong of *Jones* is the installing *and* the watching, then is just the watching alone going to be enough to trigger traditional *Katz* recognition? Based only on the majority opinion, we cannot say.³²

II. WHY THE ALITO CONCURRERS WERE RIGHT

The previous section explains why the concurers should have paused a moment before justifiably bursting out laughing when the majority shouted trespass. But does that mean the Alito concurers should be immune from criticism themselves? Because the majority holding is not trespass-only, but rather is trespass-plus-*Katz*, Justice Scalia spends his time defending the “plus” formulation rather than simply attacking the concurrence's *Katz* test. This is no surprise—why should the majority spill ink to criticize a test that it concedes it may turn to in future cases?³³

And, to be sure, *Katz* can get the job done. Justice Alito is right to chide the majority for harkening back to the Founders, given that “it is almost impossible to think of late-18th-century situations that are analogous” to *Jones*'s month of

³¹ Even though the device would not generate any evidence suppressible in a criminal case, such a question might be relevant for a section 1983 suit.

³² Justice Scalia tells us only that “the obtaining of information is not alone a search unless it is achieved by such a trespass *or invasion of privacy*,” *Jones*, 132 S. Ct. at 951 n.5 (emphasis added), which on its face suggests the difference lies entirely in the how: if a remote tracker is as much an invasion of privacy as an installed tracker is a trespass, then the Constitution is violated. However, whereas a *minor* trespass such as that in *Jones* was enough to trigger constitutional protection when coupled with the invasion of privacy that occurred from the ensuing surveillance, it is not at all clear that a minor invasion of privacy from nontrespassory action would also be enough even when coupled with the same degree of ensuing surveillance.

³³ *Id.* at 953 (“Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.”).

satellite surveillance.³⁴ Surely an analysis based on something other than property rights is warranted. Justice Alito is also right to liken the majority's dependence on physical concepts to the discredited approach associated with the cases on wiretapping.³⁵ Justice Alito proffers that history as evidence of the death of trespass theory, but its real import may be to remind everyone that the Constitution (and its spokesperson, the Court) is widely considered to have faltered during its first brushes with 21st century technology by stubbornly clinging to property law.

Moreover, a *Katzian* concept of "privacy" is an important one that most people probably do associate with the Fourth Amendment—perhaps not privacy the way the Court has precisely conceived of it, but certainly some idea of non-interference from the government. If so, then that further insulates the concurrers from the criticism that they are relying on a nebulous test. After all, however poorly defined in the abstract, the core of a "non-interference" interest surely encompasses the police surreptitiously sticking a device on your car that will report your location for eternity.

So, viva *Katz*? Not necessarily. If Justice Scalia were to be justified in laughing at the concurrers, it would be at the continued effort to pass off the *Katz* test as the rule of law rather than *ad hoc* judicial discretionary decision-making. There is a reason the *Katz* test has become the bugbear of courts and academics alike. As the concurrers conceded, "[i]t involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks."³⁶ In this respect, "expectation of privacy" can operate less like a test and more like a label that is attached after the fact and that simply signals membership in a particular camp of ideas about the proper reach of government—like calling sparkling wine champagne or prosecco.

The greatest disappointment of the concurring opinion, therefore, is its refusal to even attempt a theory of Fourth Amendment applicability that would have buttressed the same ultimate holding, but with a test that might apply beyond the particular facts of this case. For example, the D.C. Circuit in the opinion below deftly articulated a "mosaic theory," observing that "the whole of one's movements is not exposed *constructively* even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts."³⁷ One might easily extrapolate from this reasoning a principle by which comprehensive or prolonged compilations of data might receive Fourth Amendment protection. It might beneficially apply in cases involving data

³⁴ *Id.* at 958 (Alito, J., concurring).

³⁵ *Id.* at 959 (Alito, J., concurring).

³⁶ *Id.* at 962 (Alito, J., concurring).

³⁷ *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010). The court gave a colorful example: "a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story." *Id.* at 562.

mining, or public cameras, or other new technologies that similarly press the limits of constitutional tolerance.

Yet the Alito concurers do not so much as mention the word “mosaic.” The closest acknowledgment is almost a rebuke.³⁸ In reproaching the majority’s property law theory, Justice Alito references a nugget of something akin to mosaic theory—the idea that the constituent pieces of a police activity might each independently pass constitutional muster, yet fail when considered together.³⁹ But Justice Alito’s intent is to disparage Justice Scalia’s rationalizations, not to endorse a new constitutional approach.

Rather, and in contrast to the valuable insights offered by the D.C. Circuit, the Alito concurers mechanically apply the *Katz* test in four unhelpful steps that effectively underscore its subjectivity. Namely, they: 1) acknowledge that technology upsets conventional understandings of privacy; 2) give an intriguing and long overdue nod to the fact that technology removes practical constraints that have historically cabined police intrusiveness;⁴⁰ 3) offer a quick canvas of the state legislative efforts in this area that turns up little activity; and 4) abruptly conclude that long term monitoring qualifies for Fourth Amendment protection (although “we need not identify with precision the point at which the tracking of this vehicle became a search”). Hardly the kind of guidance for which lower courts and law enforcement actors confronted with questions about e-mail and cell site tracking and other new technologies—not to mention *three* week long GPS surveillance—have been clamoring.

III. JUSTICE SOTOMAYOR STANDS ALONE

So if property feels mostly wrong but a little bit right, and expectation-of-privacy feels mostly right but effectively arbitrary, where does that leave the Fourth Amendment? Relatedly, where does that leave Justice Sotomayor? She clearly agrees with much of the majority and of the concurers: the Fourth

³⁸ Justice Sotomayor, in contrast, comes a bit closer by at least “ask[ing] whether people [would] reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.” *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

³⁹ *Id.* at 958 (Alito, J., concurring).

⁴⁰ Justice Alito made a similar point during oral argument, remarking that [T]he heart of the problem that’s presented by this case and will be presented by other cases involving new technology is that in the pre-computer, pre-Internet age, much of the privacy—I would say most of the privacy—that people enjoyed was not the result of legal protections or constitutional protections; it was the result simply of the difficulty of traveling around and gathering up information.

Transcript of Oral Argument at 10, *United States v. Jones*, 132 S. Ct. 945 (2011) (No. 10-1259).

The same theme was echoed by Justice Sotomayor in her opinion. *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (“And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: ‘limited police resources and community hostility.’”).

Amendment is trespass-plus-*Katz*, and technology poses a special problem. So why does she write alone? As the critical fifth vote to make the majority, her views may provide the best basis on which to resolve the first two thoughts raised by reading *Jones*: “Does trespassory short-term GPS tracking activity also impinge on a constitutional interest?” and “How does *Jones* apply to prolonged non-trespassory surveillance technologies?”

With regard to the first issue, Justice Sotomayor alone intimates that “even short-term monitoring” using GPS tracking might invoke constitutional scrutiny.⁴¹ Interestingly, her reasoning appears to rest less on the trespassory act than on her fundamental discomfort with the revealing nature of GPS monitoring. In contrast, the majority inexplicably avoids the topic—under a conventional trespass-based approach it seems that it should equally offend the Constitution, but Justice Scalia’s trespass-as-search logic may leave room for short-term monitoring not to provide enough offense to privacy to vault it to constitutional stature. The Alito concurrence requires no parsing: it expressly states that short term monitoring would not raise Fourth Amendment issues.⁴² Accordingly, the writing on the wall, while admittedly ambiguous, seems to suggest that even GPS-based short-term surveillance may remain unregulated.

The more troubling question relates to the use of prolonged GPS tracking conducted via a nontrespassory method of surveillance—say, tapping into a person’s cell phone or tuning into a vehicle’s pre-installed OnStar system. It is clear that the Alito concurrences would find the lack of a physical intrusion immaterial. In contrast, by relying solely on trespass, the majority is able to leave for another day the applicability of a *Katz*-only analysis to a situation that did not involve invasion of a property right.⁴³ Based on Justice Scalia’s prior statements, it is possible that he does not think such action would implicate the Fourth Amendment⁴⁴—a view of the majority opinion shared by the Alito concurrences,⁴⁵

⁴¹ Of course, the question may somewhat be moot, inasmuch as short-term monitoring may more readily be conducted using technology like that presented in *Karo* and *Knotts*, or through nontrespassory means.

⁴² Cf. *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) (“[R]elatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable.”).

⁴³ *Id.* at 953 (“Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis”); *id.* at 954 (“It may be that achieving the same result through electronic means, without accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”).

⁴⁴ See also *supra* note 32. Some might argue that Scalia’s position in *Kyllo*—that use of a heat sensor on the walls of a home constituted an invasion of privacy—proves that he would likely consider a nontrespassory prolonged investigation a “search.” But *Kyllo* might be distinguished in that it entailed surveillance of the home—a constitutionally sacrosanct place—thereby exacerbating the “trespass” aspect of the analysis, and revealed information he deemed in no way exposed to the public, thereby exacerbating the “obtaining of information” aspect. In contrast, automobiles searches are routinely exempted from the warrant requirement, and their movements are typically public to some degree. It is also significant that of the Justices in the *Jones* majority, only Thomas joined Scalia in *Kyllo*; Justice Kennedy dissented and Justice Roberts was not yet on the bench.

and possibly by Justice Sotomayor herself.⁴⁶ In fact, the position of the Justices in the majority as to this question was sufficiently ambiguous that Justice Sotomayor felt it necessary to send a very clear signal to lower court judges (at least, those who can count) that: “I agree with Justice Alito that, at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy’” even when done with “nontrespassory surveillance techniques.”⁴⁷

Of course, that sounds so close to what the concurers wrote that it may imply an easy majority (Justice Sotomayor plus the Alito concurers) to hold that *Katz* is violated by a nontrespassory version of what the government attempted in the *Jones* case. That was the lesson that I took away after my first encounter with the opinion, but upon further reflection, there may be subtle distinctions between the two concurring opinions—between Justice Alito’s basic *Katz* and Sotomayor’s vision of *Katz*-plus, that suggest that outcome is not as predetermined as it may seem.

For instance, the Alito concurring Justices agree that “the availability and use of [modern devices] will continue to shape the average person’s expectations about the privacy of his or her daily movements.” Given the ubiquity of GPS enabled mobile phones and FourSquare “check-ins,” it may therefore be much easier to evade constitutional review with a nontrespassory surveillance method than at first glance appeared.⁴⁸ This view is underscored by Justice Alito’s apparent willingness to barter constitutional protection: “[n]ew technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile.”⁴⁹ In other words, if *Katz* is only about privacy, and people choose to capitalize on the convenience of EZ-Pass even though they know it creates a record of their toll crossings, then *Katz* will not protect them. In this respect, there is an irony to Justice Alito’s mockery of Justice Scalia for his narrow and misguided focus on property interests, given that his own opinion tenders such a cramped notion of constitutional privacy that it takes nothing more than switching on one’s cellphone to obliterate it.

In contrast, Justice Sotomayor appears willing to wholly reimagine doctrine that would honor the Fourth Amendment’s purpose while remaining compatible with modern life. She is the only Justice to mention—albeit obliquely—the First Amendment associational and speech interests that often move in tandem with

⁴⁵ *Jones*, 132 S. Ct. at 961–62 (Alito, J., concurring) (highlighting that the Court’s approach would find prolonged surveillance conducted through nontrespassory means “not subject to any Fourth Amendment constraints”).

⁴⁶ *Id.* at 955 (Sotomayor, J., concurring) (“In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion’s trespassory test may provide little guidance.”).

⁴⁷ *Id.* (Sotomayor, J., concurring).

⁴⁸ *Id.* at 963 (Alito, J., concurring).

⁴⁹ *Id.* at 962 (Sotomayor, J., concurring).

Fourth Amendment values.⁵⁰ She is the only Justice to suggest that constitutional privacy should not be equated with secrecy.⁵¹ She openly calls out the “third party doctrine,” suggesting that the Court “reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”⁵² And she beefs with Justice Alito’s willingness to trade constitutional protection for “convenience or security.”⁵³ In short, her opinion is the only one that contains any trace of vision, even as she admits to struggling with how precisely to realize it.

IV. WHY *JONES* REALLY MATTERS

Tracking the *Katz* (Alito), *Katz*-plus (majority) and super-*Katz* (Sotomayor) positions in the Fourth Amendment trigger debate is entertaining, but the ultimate holding in *Jones*—the unanimous agreement that the Fourth Amendment applies to prolonged location tracking via an attached GPS device—is not actually the case’s most interesting feature. Instead, the most compelling parts of the opinions all relate to the same technical aspect of the case that so confounded the press. Given that nine Justices agree that the Fourth Amendment applies to location tracking, what is required for police to engage in it? *Jones* proffers four interesting insights along these lines that have largely gone unremarked.

First, it is significant, although certainly not surprising, that no party nor amicus, much less any Justice, entertained the position that prolonged GPS tracking should simply not be allowed. In this age of taking our shoes off at the airport or showing our purse contents at sporting events, it is apparently beyond dispute that the police should have access to this information—it is simply a question of how many hurdles they should have to jump. Contrast that expectation to the initial reception to wiretapping technology. In the 1920s, the Attorney General and FBI renounced wiretaps as “unethical,”⁵⁴ and as late as 1967 President Johnson denounced wiretaps for domestic policing in his State of the Union address.⁵⁵ Yet even in a non-election year, the idea of President Obama proposing

⁵⁰ *Id.* at 956 (Sotomayor, J., concurring).

⁵¹ *Id.* at 957 (Sotomayor, J., concurring).

⁵² *Id.* (Sotomayor, J., concurring).

⁵³ *Id.* at 957 (Sotomayor, J., concurring) (“Perhaps, as Justice Alito notes, some people may find the ‘tradeoff’ of privacy for convenience ‘worthwhile,’ or come to accept this ‘diminution of privacy’ as ‘inevitable,’ and perhaps not. I for one doubt that people would accept [it] without complaint” (internal citation omitted)).

⁵⁴ JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 200 (1966).

⁵⁵ President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 10, 1967) (“We should outlaw all wiretapping—public and private—wherever and whenever it occurs, except when the security of this Nation itself is at stake—and only then with the strictest governmental safeguards. And we should exercise the full reach of our constitutional powers to outlaw electronic ‘bugging’ and ‘snooping.’”).

to outlaw police GPS monitoring seems unfathomable. This may be a comment on the ubiquity of technology in our life—we can no longer imagine cutting off law enforcement from such a fertile source of information. Or, more alarmingly, it may be a comment on ubiquity of law enforcement—we can no longer imagine any truly private sphere.

Second, a majority of the Justices appear willing to explore the idea that the Fourth Amendment need not be trans-substantive. That is, contemporary Fourth Amendment doctrine is, at least on the surface, offense-neutral. If a warrant is required, it is required whether the officer suspects that the offender committed a murder or a petty theft. But five Justices in *Jones* signed off on the idea that this need not be the case. Justice Alito closed his opinion noting that “[w]e need not consider whether prolonged GPS monitoring in the context of investigations involving *extraordinary offenses* would similarly intrude on a constitutionally protected sphere of privacy,”⁵⁶ and in her statement of agreement with Justice Alito that long term monitoring impinges expectations of privacy, Justice Sotomayor qualified her statement as applicable to “most offenses.”⁵⁷ Although these brief comments by no means espouse a new theory of the Fourth Amendment, they do evince a willingness to consider adjusting the scope of protection according to the offense being investigated. That alone is revolutionary, as Justice Scalia testily pointed out.⁵⁸

Logistically, Justices Alito and Sotomayor’s statements are confusing in that they suggest that the nature of the offense may calibrate the availability of Fourth Amendment protection (the protected interest question), as opposed to vary the procedural device necessary for the police to gain access (the warrant question). By way of comparison, it seems both more natural and more reasonable to hold that all long-term GPS tracking triggers Fourth Amendment scrutiny, but that police may satisfy constitutional requirements more readily when investigating a terrorist than when investigating a petty thief. In contrast, the language of the concurrences suggests that the alleged terrorist has fewer protected interests than the thief, instead of the same interests less strenuously defended.

Third, contrary to the headlines, none of the three opinions stated that a warrant was the only means of satisfying the Fourth Amendment. The opinions of

⁵⁶ *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) (emphasis added).

⁵⁷ *Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring) (“I agree with Justice Alito that, at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’”).

⁵⁸ Justice Scalia testily noted as much, remarking that “[t]here is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated.” *Id.* at 954. Ironically, *Gant*—the holding of which embraced a position promoted by Justice Scalia—might be considered a stepping stone to this notion, inasmuch as the Court held that the nature of the offense of arrest should limit the scope of the search permissibly undertaken by officers. *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring) (limiting searches incident to arrest in an automobile to situations of actual danger or suspicion that the vehicle contains evidence relating to the offense of arrest).

Justices Alito and Sotomayor might even be read to advise that it is not: both intimate that oversight by a coordinate branch would alleviate some of the constitutional problems, without stating that a warrant would be a necessary floor. Even the majority opinion, authored by the Justice Most Likely to Require a Warrant,⁵⁹ ultimately ducked the question, noting that the government forfeited its argument that the warrantless search was lawful.⁶⁰ Nevertheless, the majority still took pains to admonish that law enforcement may “always seek a warrant”⁶¹ in response to the concurrence’s complaint that the opinion bred uncertainty, suggesting that warrants were at least to some degree on the brain.

That the warrant question might remain open at all is a strong statement of how far the Court has drifted from its first deviation in *Terry*. Reasonableness used to be populated chiefly by two main threads of cases: stop-and-frisk and suspicionless searches that required a “special need.”⁶² In *Samson v. California*,⁶³ however, the Court seemed to push these boundaries by holding that targeted suspicionless searches for a law enforcement purpose were constitutionally permissible. The reasoning—that parolees and probationers held conditional liberty that diminished their privacy entitlements under the Constitution—seemed dangerous but easily distinguishable. But if *Jones* is a signal that the Court might approve a legislative scheme that provides for surveillance according to standards less than probable cause and without particularity, then it constitutes a radical shift. That is, although the Supreme Court has not yet overtly accepted the notion that the “reasonableness” clause might approve full-blown warrantless searches targeted to a particular person for ordinary law enforcement purposes, *Jones* may prove that the Court has not rejected it, either.

Last, and perhaps most intriguingly of all, a majority of Justices agreed that the whole mess might better be left to legislative bodies to figure out. Adopting a

⁵⁹ I say this because Justice Scalia is: 1) an avowed originalist unlikely to stray too far from the constitutional text; 2) the author of *Kyllo v. United States*, 533 U.S. 27 (2001), which imposed a warrant requirement for heat sensors; and 3) the Justice who chastised his colleagues for endorsing a cautious and incrementalist approach to resolving questions involving new technologies, stating “the times-they-are-a-changing is a feeble excuse for disregard of duty.” *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring in part and concurring in the judgment) (“The Court’s implication that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible.”). That said, Justice Scalia did embrace an interpretation of the Amendment that allows for “reasonableness” in place of a strict warrant standard. See *California v. Acevedo*, 500 U.S. 565, 583–84 (1991) (“[The] supposed ‘general rule’ that a warrant is always required does not appear to have any basis in the common law.”).

⁶⁰ *Jones*, 132 S. Ct. at 954.

⁶¹ *Id.*

⁶² Of course, there are also occasional odd cases about administrative warrants, but they were doctrinally atypical.

⁶³ 547 U.S. 843 (2006).

position that is most associated with Professor Orin Kerr,⁶⁴ whom he cites, Justice Alito declared that “[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”⁶⁵ Justice Sotomayor’s endorsement was more tentative. In cautioning against “entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse,”⁶⁶ she left open the possibility that such supervision might stem from legislative, rather than judicial, action.

Both references bolster the claim that the concurrers’ failure to impose any warrant requirement may be because the Court wishes to encourage the legislatures to come up with their own guidelines, which plausibly might allow some lesser showing. But from the opinions alone, it is hard to gauge just how serious the Justices are in their exhortation. By offering no more than conclusory statements about the merits of democratic decision-making, the Justices certainly provide little hope that the Court will assume a robust role in defending constitutional values. Nor do their passing remarks provide much guidance to legislatures who choose to take up their challenge.

As I have written elsewhere, the Court is right to look to legislatures for help in sorting through the challenges of policing with new technologies.⁶⁷ The warrant can be too blunt an instrument for the sensitive issues raised by modern investigative tools. A warrant unlocks the door guarding the individual’s privacy and effectively turns away; legislative rules, in contrast, can monitor. They can dictate standards for proper maintenance, search and timely disposal of records; require training, recordkeeping or reports about law enforcement behavior; and enforce other protections tailored to the specific technology at issue.

At the same time, it would be wrong for the judiciary to cite these advantages as a justification for abdicating its primary role as defender of the Constitution. Too many public choice problems attend efforts to legislate in this area to entrust Fourth Amendment rights wholly to the democratic processes. Moreover, the Court has both a political and moral obligation to fulfill its role as a co-equal

⁶⁴ Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004).

⁶⁵ *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

⁶⁶ *Id.* at 956 (Sotomayor, J., concurring).

⁶⁷ I make this argument more directly in two places: first, in a position paper co-authored with Professor Peter Swire, in which we lay out our vision for this mode of constitutional adjudication. See Peter Swire & Erin Murphy, *How to Address “Standardless Discretion” After Jones* (Pub. Law Research Paper No. 177, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122941. I also make it in a forthcoming article that scrutinizes the privacy enactments actually promulgated by the United States Congress. See Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, The Fourth Amendment, and Statutory Law Enforcement Exemptions*, MICH. L. REV. (forthcoming 2013), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021439.

branch commissioned with the interpretation and defense of our constitutional rights.

Rather than defer entirely to the political branches, then, a better approach is one that uses judicial review to focus legislatures on the promulgation of procedural safeguards against abuse, and the assurance of actual police compliance with announced rules. To conduct this kind of review, the Court at the very least must demand that law enforcement improve its documentation and internal assessments of its own policies and activities. To take one easy target, the government's claim that "[l]aw enforcement has not abused GPS technology. No evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote,"⁶⁸ calls to mind the old adage "absence of evidence is not evidence of absence." Constitutional review that asks the government to back up such claims with evidence—say, documentation of detailed internal standards for engaging in GPS monitoring, coupled with quality assurance reports about the frequency, duration, and success of its efforts—has the potential to protect rights much more meaningfully than even a blanket warrant requirement.

V. SUM

As a matter of primitive Court watching, *Jones* is a testament to the strange bedfellows often found in Fourth Amendment cases. The briefs of the amici (of which all but one was submitted on behalf of the respondent) paint a revealing picture: the ACLU, Electronic Frontier Foundation, and Electronic Privacy Information Center predictably all argued against the government, but so too did the Rutherford Institute, the Cato Institute, and a consortium of gun and libertarian interest groups. Two prominent court conservatives argued divergent positions, each bridged by Justice Sotomayor, one of the more liberal members of the Court.

From one step removed, it is hard to determine what the next case will hold; not the one that asks whether nontrespassory surveillance infringes a Fourth Amendment interest, but the one that asks whether a warrant is the constitutional requirement for engaging in prolonged tracking. In any case, my own prediction is that Justice Sotomayor's opinion, not unlike the concurring opinion by Justice Harlan that ended up setting the *Katz* standard, endures as the first visionary proclamation of how to manage the challenges that future cases are likely to present.

⁶⁸ Brief for Petitioner at 14, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).